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Supreme Court of the United States.

OCTOBER TERM, 1971.

No. A-1068.

MANUEL J. BELLO AND GEORGE PERRON,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioners Manuel J. Bello and George Perron respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 24, 1972.

Opinion Below.

The opinion of the Court of Appeals not yet reported appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Massachusetts.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented.

1. Whether the strict liability standard found by the Court of Appeals for the First Circuit for violations of 26 U.S.C. 5301 (c) (4) and 26 U.S.C. 5606 violate due process.

2. Whether agents of a corporation which sells or offers liquor for sale may be convicted for violation of the provisions of 26 U.S.C. 5301 (c) and 26 U.S.C. 5606 without the indictment alleging any element of scienter.

3. Whether the addition of the word "knowingly" to an indictment charging violation of 26 U.S.C. 5301 (c) and 26 U.S.C. 5606 by the trial Court renders the indictment and the conviction void.

4. Whether Internal Revenue Agents of the Alcohol, Tobacco and Firearms Division testing liquor bottles taken from behind a bar without consent is violative of the Fourth Amendment.

Statutory Provisions Involved.

United States Code, Title 26:

§ 5301 (c) (4).

(c) Refilling of liquor bottles.—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person, shall—

. . . . . .

(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of paragraph (3);

. . . . . .

(d) Penalty.—

For penalty for violation of this section, see section 5606. Added Pub. L. 85–859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1374.

§ 5606. Penalty relating to containers of distilled spirits.

Whoever violates any provision of section 5301, or of any regulation issued pursuant thereto, or the terms or conditions of any permit issued pursuant to the authorization contained in such section, and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense. Added Pub.L. 85–859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1402.

§ 5146. Preservation and inspection of records, and entry of premises for inspection.

. . . . . .

(b) Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises. Added Pub. L. 85–859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1348.

§ 5301. General.

(a) Requirements.—Whenever in his judgment such action is necessary to protect the revenue, the Secretary or his delegate is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—

(1) to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits (within the meaning of such term as it is used in section 5002(a) (6)) for other than industrial use; and

(2) to require, of persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith.

Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to, law and shall apply as well to persons not liable for tax under the internal revenue laws as to persons so liable.

§ 7606. Entry of premises for examination of taxable objects.

(a) Entry during day.—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

(b) Entry at night.—When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties.

(c) Penalties.—

For penalty for refusal to permit entry or examination, see section 7342. Aug. 16, 1954, c. 736, 68A Stat. 903.

§ 7342. Penalty for refusal to permit entry or examination.

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500. Aug. 16, 1954, c. 736, 68A Stat. 872.

Statement of the Case.

On February 25, 1970, Revenue Agents of the Alcohol, Tobacco and Firearms Division entered a lounge owned by Wedgewood, Inc. They identified themselves to a barmaid and commenced to seize and test bottles of liquor located behind the bar. There were over 120 bottles, opened and unopened, on the bar. Forty were tested and 10 found to be altered. Petitioner Perron arrived one hour later when most of the testing was finished. Petitioner Bello was never present.

Perron owned the majority shares of stock in the bar and Bello was an employee. His duties were to occasionally stock the bar; he also had a set of keys to the liquor storeroom. No altered liquor was found in the storeroom. There was no evidence that either Bello or Perron sold or offered liquor for sale.

The corporation, Bello and Perron, were indicted for violations of 26 U.S.C. 5301 (c). Bello and Perron were alleged to be corporate agents in the indictment. Bello and Perron moved to suppress the seized liquor. Their motions were denied. During the trial Bello and Perron moved for acquittal on the basis that the indictment was faulty for failure to allege knowing possession for the reason that knowledge must be alleged against corporate agents. The judge denied the motion but orally inserted the word "knowingly" in the indictment and included the same in his instructions to the jury.

The jury returned verdicts of guilty against Perron and Bello. Perron received a one-year suspended sentence and was placed on probation for two years. Bello was sentenced to prison for six months. Each was fined $1,000. The corporation was also fined $1,000.

All defendants appealed. On January 27, 1972, the Court of Appeals for the First Circuit reversed the convictions of Perron and Bello. The Court held that since both were corporate agents the indictment was fatally defective in that scienter should have been alleged. They also found the indictment to have been improperly amended by the trial Court (App. B).

A timely petition for rehearing was filed by the Government. A substituted opinion was issued (App. A) and a new order made (App. C) and a new judgment was entered March 24, 1972 (App. D). On April 12, 1972, Mr. Justice Brennan extended petitioners' time for filing a petition for writ of certiorari to and including May 22, 1972.

Reasons for Granting the Writ.

1. The Court of Appeals found that "Sections 5301 (c) and 5606 impose strict liability on persons . . . who sell or offer liquor for sale if they violate the provisions of § 5301 (c), regardless of scienter." (App. A, p. 14.)

This holding requires conviction and exposure to prison sentences of up to one year for bartenders, waitresses and clerks in all establishments where liquor is sold. No protection is afforded the employee from the unscrupulous owner desirous of increasing profits.

An employee has no way of taking reasonable means to protect himself.

A nonsupervisory employee is even stripped of certain protection afforded the owner under 26 U.S.C. 7342.

In the instant case a scientific field test by trained agents was required to determine the presence of altered spirits. Few if any bartenders are so equipped.

The need of Congress to regulate the liquor industry must be weighed against the harm imposed upon helpless individuals. No compelling regulatory need requiring strict liability has been dmonstrated in possession of altered liquor violations.

The revenue would be amply protected by imposing strict liability against owners, individual and corporate. Further revenue loss would be prevented by imposing liability on any knowing wrongdoer.

2. At no time did the Court of Appeals for the First Circuit properly interpret 26 U.S.C. 5301 (c) (4) and 26 U.S.C. 5606. The first opinion of the Court (App. B) properly dismissed the indictment against both Bello and Perron on the grounds that scienter was required in the indictment (App. B, p. 26), but the rationale behind said opinion was erroneous.

The substituted opinion reached a different result (App. A), that scienter was not required, but still with faulty reasoning.

The indictment [1] charged Bello and Perron with a viola-

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[1] Count II reads as follows:

"That on or about February 25, 1970, at Lowell in the District of Massachusetts, WEDGEWOOD, INC., a Massachu-

tion of section 5301 (c) (4) in their capacity as agents of a corporation which is the person who sells or offers for sale. To convict the corporation, no scienter is required to be alleged or proved. This is consistent with the congressional purpose to regulate the liquor industry. Title 26 refers to internal revenue laws. It is obvious that Congress desired to collect and protect revenues to be obtained from purveyors of liquor.

An inspection of the legislative history of section 5301 shows a desire on the part of Congress to make enforcement effective on the basis of strict liability. This is evident when one views the predecessor to the present penalty section 5606 (5641 of 1954 Code). Congress eliminated the requirement that the offense be committed wilfully. It retained, however, the "knowingly" requirement for a certain class of persons.

Bello and Perron fall into that excepted class. They are corporate agents and therefore can be convicted only for "knowing participation." The use of the word "agent and employee" as used in section 5301 (c) indicates congressional intent not to allow principals to escape liability by claiming the unlawful acts were committed by their agents or employees.

The "Whoever" in section 5606 refers only to the principal described in section 5301 (c). The word "and" used before reference to officers, directors or agents of corporations shows further that Congress would not allow persons

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setts corporation doing business as Celebrity Lounge, and GEORGE A. PERRON and MANUEL J. BELLO, agents of said corporation, the defendants herein, being persons who sell and offer for sale distilled spirits, did possess ten (10) liquor bottles, more or less, the original contents of which had been altered or increased, in violation of the provisions of paragraph (3) of Title 26, United States Code, Section 5301(c). In violation of Title 26, United States Code, Section 5301(c) (4)."

to hide behind a corporate shell. The corporate veil would be pierced and its agents found guilty provided they acted with knowledge.

3. The trial Court recognized the insufficiency of the indictment and inserted therein the word "knowingly" when Bello and Perron moved for acquittal at the close of the Government's case (App. A, p. 13). The amendment of the indictment was improper and rendered the indictment void. *Ex Parte Bain,* 121 U.S. 1. *Stirone* v. *United States,* 361 U.S. 212, 217. Bello and Perron were denied the basic protection of a proper grand jury indictment. This contention is made even if it were to be held that the insertion was not essential to the indictment. The trial jury could not help being misled.

4. Bello and Perron contend that the testing by the Government agents violated their Fourth Amendment rights. This case falls in between the facts found in *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970) (use of force to search), and those found in *United States* v. *Biswell,* cert. granted, 40 U.S.L.W. 4489 (1972) (consent was coerced).

The present case involved a seizure which was in process and nearly finished when Perron arrived on the premises (App. A, p. 15). Perron was never afforded the statutory right to refuse and incur sanctions imposed by 26 U.S.C. 7342.

The coerced consent to complete the search negated by *Biswell, supra,* was more pronounced here. Perron did not object for the testing was in process. To object would have subjected him to punishment for violation of 26 U.S.C. 5301 (c) (4) and 26 U.S.C. 7342.

Conclusion.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

PAUL F. CALLERY,
Counsel for Petitioners.

PHILIP S. NYMAN,
BRIAN J. SULLIVAN,
Of Counsel.

Appendix A.

United States Court of Appeals for the First Circuit.

No. 71-1099.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WEDGEWOOD, INC.,
GEORGE A. PERRON,
and
MANUEL J. BELLO,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Philip S. Nyman, with whom *Brian J. Sullivan* was on brief, for appellants.

George V. Higgins, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellee.

SUBSTITUTED OPINION OF THE COURT.

March 24, 1972.

McENTEE, *Circuit Judge.* This is an appeal by one corporate and two individual defendants from convictions for possession of altered liquor in violation of 26 U.S.C. § 5301(c)(4) (1970). Wedgewood, Inc. is a Massachusetts corporation doing business as the Celebrity Lounge in Lowell, Massachusetts. Perron is the owner and manager of Wedgewood; Bello is an employee with some managerial duties. On February 25, 1970, Internal Revenue agents of the Alcohol, Tobacco and Firearms Division entered the Lounge and inspected a number of bottles of liquor. As a result of this inspection, the contents of ten bottles were found to have been altered, and the defendants were indicted.

The indictment charged the three defendants jointly in each of two counts. At trial the court directed acquittals on Count I, which charged violations of 26 U.S.C. § 5301(c)(2).[1] The jury returned verdicts of guilty on Count II, which charged violations of 26 U.S.C. § 5301(c)(4).[2] The threshold question on appeal is the validity of Count II of the indictment in light of its failure to allege "knowing" possession and the individual defendants' status as agents of the corporation.[3]

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[1] Section 5301(c)(2) was read by the district court as referring only to adulteration by the addition of other distilled spirits. Since the evidence established only alteration, but not the addition of distilled spirits, the court directed acquittals of all three defendants on this count.

[2] The notices of Judgment and Commitment, signed by the district court, recorded convictions on both counts. This was clearly an oversight. The record shows convictions on Count II only, and the sentences imposed did not exceed the statutory maximum for a single offense.

[3] Count II reads as follows:

"That on or about February 25, 1970, at Lowell in the District of Massachusetts, WEDGEWOOD, INC., a Massachu-

At the close of the government's evidence Perron and Bello moved for acquittals on Count II on the ground that the indictment was defective. While a motion for acquittal may not be the most expeditious way to attack the validity of an indictment, the failure of an indictment to charge an offense "shall be noticed by the court at any time during the pendency of the proceeding." Rule 12(b)(2), Fed.R. Crim.P. *See also* Rule 34, Fed.R.Crim.P. The trial court denied defendants' motions, orally added "knowingly" to the indictment,[4] and later instructed the jury that in order to convict, it had to find the individual defendants in knowing possession.

Section 5301(c) imposes criminal liability on "[any] person who sells, or offers for sale, distilled spirits, or agent or employee of such person," if that person violates any of

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setts corporation doing business as Celebrity Lounge, and GEORGE A. PERRON and MANUEL J. BELLO, agents of said corporation, the defendants herein, being persons who sell and offer for sale distilled spirits, did possess ten (10) liquor bottles, more or less, the original contents of which had been altered or increased, in violation of the provisions of paragraph (3) of Title 26, United States Code, Section 5301(c). In violation of Title 26, United States Code, Section 5301(c)(4)."

[4] The bench conference on defendants' motions for acquittal went as follows:

"Mr. DiAdamo [defense counsel]: . . . By basis is [26 U.S.C. §] 5606.

"Mr. Daniels [defense counsel]: Whoever knowingly.

"THE COURT: That is a question of fact for the jury.

"Mr. DiAdamo: Your Honor please, it is not a question—

"THE COURT: I know what your defense is. They knew nothing about it. That is for the jury. You see, these fellows down in the office, downstairs, don't know how to draw an indictment. You can't find the word 'knowingly' there, can you?

"Mr. DiAdamo: No, your Honor.

"THE COURT: Well, I am going to put it in, and I will put in willfully, too, if you want me to. Do you know what 'willfully' means? I'll bet you don't. 'Knowingly' I will put in there."

the four enumerated subsections. The provision does not include a scienter requirement, but imposes strict liability. Pursuant to 26 U.S.C. § 5301(d),[5] violations of the section can be punished only pursuant to the penalty provision, 26 U.S.C. § 5606, which provides:

> "Whoever violates any provision of section 5301, or of any regulation issued pursuant thereto, or the terms or conditions of any permit issued pursuant to the authorization contained in such section, *and any officer, director, or agent of any corporation who knowingly participates in such violation,* shall, upon conviction, be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense." (Emphasis added.)

Perron and Bello contend that, since they were corporate agents, they can be punished only for "knowing participation," and that consequently the indictment was fatally defective for failure to include all the essential elements of the offense charged.

The individual defendants, however, misconstrue the intent of the legislation and misread the language of the indictment. Sections 5301(c) and 5606 impose strict liability on persons, be they individuals or corporations, who sell or offer liquor for sale if they violate the provisions of § 5301(c), regardless of scienter. The statute specifically does not relieve one merely because, in selling or offering to sell, he happens to be an "agent or employee" of the owner. The apparent purpose of the emphasized portion of § 5606, *supra,* is to provide that persons who are corporate officers, directors, or agents and who do not themselves sell or offer for sale but aid and abet a corporation that does,

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[5] 26 U.S.C. § 5301(d) provides: "*Penalty.*—For penalty for violation of this section, see section 5606."

may not be punished if they lack scienter. However, we are not concerned here with the scope of that provision because the individual defendants were charged directly as "persons who sell and offer for sale distilled spirits." The indictment's reference to them as agents of the corporation was merely descriptive, and the fact that they happened to be officers or agents does not reduce their direct liability.[6] We find the indictment clear and the evidence sufficient to support it.[7]

Defendants Perron and Bello moved pretrial to suppress the bottles of adulterated liquor on the grounds of an illegal search and seizure. These motions were denied, and defendants renew their claim of unconstitutional intrusion on appeal. On February 25, at approximately 2 p.m., three agents entered the barroom of the Celebrity Lounge. Neither Perron nor Bello was on the premises. The agents approached a barmaid, identified themselves, told her the purpose of their visit, and proceeded to test a number of bottles taken from behind the bar. She neither objected nor explicitly consented to the inspection. While the agents were testing the liquor, and about one hour after their arrival, Perron entered the Lounge. An agent identified himself, told Perron the purpose of the visit, and stated that the inspection was authorized. Perron did not object to continuation of the testing procedures or the seizure of

[6] We may agree that the court's informal insertion of the word "knowingly" with respect to these defendants when it sent the case to the jury would have been an improper amendment of the indictment, had it been necessary to amend the indictment. Significant amendments of indictments can be made only by the grand jury. *Russell* v. *United States*, 369 U.S. 749 (1962); *Stirone* v. *United States*, 361 U.S. (1960). However, as no amendment was required, the trial court merely gave the defendants an extra bonus of which they cannot complain.

[7] As a consequence of this holding, there is no need to reach defendants' contention that the evidence of scienter was insufficient.

twenty-one bottles, ten of which were later determined to be adulterated.[8]

Entry and inspection by the agents was made without a warrant or express consent pursuant to statutory provisions which give the Secretary of the Treasury or his delegate broad authority to enter and inspect the premises of liquor dealers. 26 U.S.C. §§ 5146(b),[9] 5301(a),[10] and 7606(a).[11]

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[8] Defendants argue Perron could not have objected because the testing was completed when he entered the premises. The evidence clearly establishes that the testing was still in progress when he entered.

[9] 26 U.S.C. § 5146(b) provides:

"(b) *Entry of premises for inspection.*—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

[10] 26 U.S.C. § 5301(a) provides, in pertinent part:

"(a) *Requirements.*—Whenever in his judgment such action is necessary to protect the revenue, the Secretary or his delegate is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—

(2) to require, of persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith.

Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to, law and shall apply as well to persons not liable for tax under the internal revenue laws as to persons so liable."

[11] 26 U.S.C. § 7606(a) provides:

"(a) *Entry during day.*—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects."

Defendants argue, these sections notwithstanding, that consent is constitutionally required for warrantless inspections where no exigent circumstances exist.

The Supreme Court, in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) held that the fourth amendment's restrictions against unreasonable searches were applicable to administrative code-enforcement inspections of personal residences, and in the companion case of *See* v. *City of Seattle,* 387 U.S. 541 (1967), this holding was extended to similar inspections of commercial property. The *See* decision, however, did not question "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product," but stated:

> "Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness." 387 U.S. at 546.

Three years later, in the case of *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970), the Court faced the issue with respect to liquor inspections. In *Colonnade* a federal agent, in the course of inspecting a catering establishment, requested that the lock on a storeroom be opened. The request was refused, whereupon the agent broke the lock, entered, and removed several bottles of liquor. The liquor licensee petitioned for the return and suppression of the seized evidence. The Court, acknowledging the long history of official regulation and supervision of the liquor industry, stated that Congress had "broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 U.S. at 76. In other words, the fourth amendment standards of reasonableness applies to liquor inspections, but in this unique area

Congress has great leeway to define what conduct is reasonable. The Court examined carefully the Congressional design, in which the provisions authorizing administrative searches, 26 U.S.C. §§ 5146(b) and 7606(a), are linked with a provision penalizing refusal to permit such searches, 26 U.S.C. § 7342, which states that

> "Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500."

Borrowing a principle of statutory construction from *Frank* v. *Maryland*, 359 U.S. 360 (1959), the Court held that § 7342 is the exclusive sanction for refusal, and that forcible entry despite the refusal of *Colonnade's* president was accordingly not authorized by the statute.[12]

The present case differs from *Colonnade* in that here defendants neither "refuse[d] to admit any officer" nor "refuse[d] to permit him to examine [the liquor bottles]." Manifestly, they could not have been penalized under § 7342. As to them, § 7342 could hardly have been the exclusive sanction, since it was no sanction at all. But by the same token, § 7342 was no bar to completing the search.

In urging the broader position that an administrative search without consent in the constitutional sense is violative of the statute, defendants would have us forget that it is indeed a statute we are interpreting, and, as we have noted, a statute in a unique field where the Court has recog-

[12] The three dissenting Justices construed the legislation as authorizing such searches when admission was refused, and therefore argued that the seizure was legal.

nized an expanded power to regulate. To add to § 5146(b) or to § 7606(a) a requirement that the officer obtain consent before an inspection would engraft a wholly new requirement foreign to the language and purpose of those provisions. Similarly, to accord to § 7342, in terms a penalty provision, broader scope in limiting searches than in imposing penalties would create a patent incongruity.

Nothing in *United States* v. *Biswell,* 442 F.2d 1189 (10th Cir.), *cert. granted,* 40 U.S.L.W. 3264 (1971), cited by defendants, persuades us to the contrary. *Biswell* held unconstitutional a federal firearms inspection statute to the extent that it authorized entry without a warrant or consent. Despite its heavy reliance on *Colonnade,* the *Biswell* court eschewed the statutory reasoning employed in that case. And insofar as *Biswell* announced a rule of constitutional law regarding administrative searches under licensing programs, that rule cannot be applied here in the face of the Supreme Court's insistence that "As respects [the liquor] industry . . . Congress has broad authority to fashion standards of reasonableness for searches and seizure." *Colonnade Corp.* v. *United States, supra,* 397 U.S. at 77. We conclude that the search in the present case was authorized under the statute and that the statute is constitutional. *See United States* v. *Hofbrauhaus of Hartford, Inc.* 313 F.Supp. 544 (D. Conn. 1970).

Defendants' remaining contentions can be disposed of quickly. Bello alleges that the prosecution wrongfully withheld evidence that he was not listed as "manager" on Wedgewood's liquor license. There is absolutely no indication that this information was suppressed. Indeed, it was part of a public record and readily available to the defense. Nor was Bello's lack of corporate title a significant fact, for the evidence established that he performed managerial duties. All three defendants allege reversible error in the court's admission of the laboratory test results which

showed the liquor to be altered. A government chemist described the tests, and although he was unable to state where and when the comparative (pure) brand name samples had been produced or bottled, he stated that the chemical standard for unaltered liquor allowed for slight variations. The test results were properly admitted; their accuracy was for the jury.

Affirmed.

Appendix B.

United States Court of Appeals for the First Circuit.

No. 71-1099.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WEDGEWOOD, INC.,
GEORGE A. PERRON,
and
MANUEL J. BELLO,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Philip S. Nyman, with whom *Brian J. Sullivan* was on brief, for appellants.

George V. Higgins, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellee.

January 27, 1972.

McENTEE, *Circuit Judge.* This is an appeal by one corporate and two individual defendants from convictions for possession of altered liquor in violation of 26 U.S.C. § 5301(c)(4) (1970). Wedgewood, Inc. is a Massachusetts corporation doing business as the Celebrity Lounge in Lowell, Massachusetts. Perron is the owner and manager of Wedgewood; Bello is an employee with some managerial duties. On February 25, 1970, Internal Revenue agents of the Alcohol, Tobacco and Firearms Division entered the Lounge and inspected a number of bottles of liquor. As a result of this inspection, the contents of ten bottles were found to have been altered, and the defendants were indicted.

The indictment charged the three defendants jointly in each of two counts, Perron and Bello being charged as agents of the defendant corporation. At trial the court directed acquittals on Count I, which charged violations of 26 U.S.C. § 5301(c)(2) (1970).[1] The jury returned verdicts of guilty on Count II, which charged violations of 26 U.S.C. § 5301(c)(4).[2] The defendants raised several contentions on appeal. We reverse the convictions of Perron and Bello, reaching only their contention that the indictment was fatally defective.[3]

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[1] Section 5301(c) (2) was read by the district court as referring only to adulteration by the addition of other distilled spirits. Since the evidence established only alteration, but not the addition of distilled spirits, the court directed acquittals of all three defendants on this count.

[2] The notices of Judgment and Commitment, signed by the district judge, recorded convictions on both counts. This was clearly an oversight. The record shows convictions on Count II only, and the sentences imposed did not exceed the statutory maximum for a single offense.

[3] The individual defendants urge two grounds which would, if accepted, require this court to direct acquittals. The first is that

The indictment, in charging Perron and Bello with possession of altered liquor, did not allege "knowing" possession.[4] The defendants did not challenge the indictment by any pretrial motions, but on the basis of the omission of the word "knowingly" moved for acquittal on County II at the close of the government's case. The trial court denied the motion, orally added "knowingly" to the indictment,[5] and later

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the evidence of scienter was insufficient. Because our reversal rests on the indictment's omission of the same element, we do not reach this contention. The second ground, a challenge to the evidence admitted to prove adulteration, is discussed below with respect to the corporation.

[4] Count II read as follows:

"That on or about February 25, 1970, at Lowell in the District of Massachusetts, WEDGEWOOD, INC., a Massachusetts corporation doing business as Celebrity Lounge, and GEORGE A. PERRON and MANUEL J. BELLO, agents of said corporation, the defendants herein, being persons who sell and offer for sale distilled spirits, did possess ten (10) liquor bottles, more or less, the original contents of which had been altered or increased, in violation of the provision of paragraph (3) of Title 26, United States Code, Section 5301(c). In violation of Title 26, United States Code, Section 5301(c)(4)."

[5] The bench conference on defendants' motions for acquittal went as follows:

"Mr. DiAdamo [defense counsel]: . . . . My basis is [26 U.S.C. §] 5606.

"Mr. Daniels [defense counsel]: Whoever knowingly.

"THE COURT: That is a question of fact for the jury.

"Mr. DiAdamo: Your Honor please, it is not a question—

"THE COURT: I know what your defense is. They knew nothing about it. That is for the jury. You see, these fellows down in the office, downstairs, don't know how to draw an indictment. You can't find the word 'knowingly' there, can you?

"Mr. DiAdamo: No, your Honor.

"THE COURT: Well, I am going to put it in, and I will put in willfully, too, if you want me to. Do you know what 'willfully' means? I'll bet you don't. 'Knowingly' I will put in there."

instructed the jury that in order to convict, it had to find the individual defendants in knowing possession.

Section 5301 nowhere requires any element of knowledge, but pursuant to 26 U.S.C. § 5301(d)[6] violations of this section can be punished only pursuant to the penalty provision, 26 U.S.C. § 5606 (1970), which provides:

> "Whoever violates any provision of section 5301, or of any regulation issued pursuant thereto, or the terms or conditions of any permit issued pursuant to the authorization contained in such section, *and any officer, director, or agent of any corporation who knowingly participates in such violation,* shall, upon conviction, be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense." (Emphasis added.)

Since § 5301 relies entirely on § 5606 for imposition of criminal sanctions, the two sections must be read together. Therefore, for a § 5301 violation by officers, directors, or agents of a corporation to be a criminal offense, the violation must include the element of knowledge.[7]

It is well settled that an indictment, whether for a felony or misdemeanor, must include all the essential elements of the offense charged. *Evans* v. *United States,* 153 U.S. 584, 587 (1894); Rule 7(c) Fed. R. Crim. P. When knowledge or

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[6] 26 U.S.C. § 5301(d) provides: "*Penalty.*—For penalty for violation of this section, see section 5606."

[7] The government argues that knowledge is not an element of the offense, relying almost exclusively on *United States* v. *Wasik,* 230 F. Supp. 280 (W.D. Pa. 1964). That case, however, discussed the knowledge requirement in relation to those who were not corporate agents. Indeed, in rejecting the argument that the indictment was fatally defective for not alleging knowledge, the *Wasik* court stated, "The Act does not specifically provide, *except as to officers, directors, or agents of a corporation,* that the violation be committed with knowledge 26 U.S.C. § 5606." (Emphasis added.)

intent is required for criminal culpability, they are essential elements of the crime and must be alleged in the indictment, *Hughes* v. *United States,* 338 F. 2d 651 (1st Cir. 1964), unless words of similar import are used, *United States* v. *Salliey,* 360 F. 2d 699 (4th Cir. 1966) or knowledge can be implied from the very nature of the act alleged, *Finn* v. *United States,* 256 F. 2d 304 (4th Cir. 1958) (using profane language). In the instant case even the most liberal reading of the indictment could not imply the element of knowledge. The indictment is not saved by tracing the language of § 5301, for that section does not set forth all the elements of the offense. *United States* v. *Carll,* 105 U.S. 611 (1881); *United States* v. *Simmons,* 96 U.S. 360 (1877).

While a motion for acquittal may not be the most expeditious way to raise the issue of a defective indictment, the failure of an indictment to charge an offense "shall be noticed by the court at any time during the pendency of the proceeding." Rule 12(b) (2), Fed. R. Crim. P. *See also* Rule 34, Fed. R. Crim. P. The addition of "knowingly" by the trial court is without effect, for an indictment may be amended in any significant manner only by resubmission to the grand jury. *Russell* v. *United States,* 369 U.S. 749 (1962); *Ex Parte Bain,* 121 U.S. 1 (1887).

> "The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for [an offense] which the grand jury did not charge." *Stirone* v. *United States,* 361 U.S. 212 at 218 (1960) (footnote omitted).

Similarly, the jury conviction on full instructions also fails to cure the defective indictment. *Hughes* v. *United States,*

340 F. 2d 609 (1st Cir. 1965) (denial of petition for rehearing).

The above analysis requires reversal of the convictions only of the individual defendants, Perron and Bello,[8] for scienter is not required of the corporate defendant. The only substantial contention raised by the corporation is that the court erred in admitting evidence of the tests performed to determine if the liquor was adulterated. A government chemist testified that he conducted several tests on the seized liquor and compared the results to identical tests on unaltered samples of the same brand names. He was unable to state when the samples had been produced or bottled, but the chemical standards for unaltered liquor did allow for slight variations. The validity of the tests was a jury question and this testimony was properly admitted. Moreover, there was no objection to its admission at trial.

The convictions of the individual defendants, Perron and Bello, are reversed, and as to them the indictment is dismissed. The conviction of Wedgewood, Inc. is affirmed.

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[8] A subsequent trial of Perron and Bello under a proper indictment will not place them in double jeopardy. *United States* v. *Ball*, 163 U.S. 662, 671-72 (1896).

Appendix C.

No. 71-1099.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WEDGEWOOD INC., ETC., ET AL.,
DEFENDANTS, APPELLANTS.

ORDER OF COURT

[Entered: March 24, 1972.]

It is ordered that the opinion of this Court of January 27, 1972, be, and the same hereby is, recalled and cancelled; and

It is ordered that the judgment of this Court of January 27, 1972, be, and the same hereby is, vacated and further

It is ordered that the petition for rehearing filed February 2, 1972, be, and the same hereby is, denied.

By the Court:
DANA H. GALLUP
Clerk.

Appendix D.

No. 71-1099.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WEDGEWOOD INC., ETC., ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT

[Entered: March 24, 1972.]

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
DANA H. GALLUP
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1533

MANUEL J. BELLO AND GEORGE PERRON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1972. On April 12, 1972, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including May 22, 1972. The petition was filed on May 24, 1972, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

471-266—72

QUESTIONS PRESENTED

1. Whether 26 U.S.C. 5301(c) imposes strict criminal liability for the possession of altered liquor.

2. Whether the trial judge prejudiced petitioners by amending the indictment to include the word "knowingly" and instructing the jury that it could convict petitioners only if it found that they had knowingly possessed altered liquor.

3. Whether, in the circumstances of this case, the search and seizure of the liquor bottles violated petitioner's Fourth Amendment rights.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted for possession of altered liquor in violation of 26 U.S.C. 5301(c)(4). Petitioner Perron received a one-year suspended sentence and was placed on two years' probation; petitioner Bello was sentenced to imprisonment for a term of six months. Each was fined $1,000. After first reversing the convictions (Pet. App. B), the court of appeals granted the government's petition for rehearing, vacated its earlier judgment, and affirmed (Pet. App. A).

On February 25, 1970, federal agents entered the Celebrity Lounge in Lowell, Massachusetts, identified themselves to a barmaid and told her that the purpose of their visit was to examine the liquor to determine if it had been altered in violation of law. The agents then began testing liquor bottles which were located behind the bar. After they had been in the bar for

approximately one hour, petitioner Perron arrived. The agents again identified themselves and explained the purpose of their visit. Perron did not object to the testing and while the tests were being conducted he went about his business in the bar.

Perron was the owner and manager of the bar, which is incorporated under the name of Wedgewood, Inc. Bello, who was not present at any time during the examination and seizure of the bottles, was an employee with some managerial duties. Perron and Bello were the only persons with keys to the liquor storeroom and they replenished the liquor at the bar as it became depleted (Vol. I, 1–31, 36).[1]

ARGUMENT

1. The court of appeals held that Section 5301(c) "does not impose a scienter requirement, but imposes strict liability" for the possession of altered liquor (Pet. App. 14). It further held that petitioners were not relieved of strict liability by the provisions of 26 U.S.C. 5606, which impose liability for a violation of Section 5301 on "any officer, director, or agent of any corporation who knowingly participates in such violation."[2] These holdings were correct.

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[1] Volumes I and II are the transcripts of trial. The volumes are not paginated consecutively; each volume begins with page 1.

[2] Section 5606 provides: "Whoever violates any provision of section 5301 * * * and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than $1,000, or imprisioned not more than 1 year, or both, for each such offense."

In enacting the statutory provisions involved in this case, Congress intended to impose strict liability for the possession of altered liquor. See S. Rep. No. 2090, 85th Cong., 2d Sess., 172, 190, relating to the Excise Tax Technical Changes Act of 1958.[3] That Congress may impose such strict liability is clear from this Court's recognition that Congress has broad power to regulate the liquor industry. *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 76; *United States* v. *Biswell,* No. 71–81, slip op. p. 3, decided May 15, 1972; see also *Stilinovic* v. *United States,* 336 F.2d 862, 864 (C.A. 8).

The provisions of Section 5606 do not require that the government charge and prove that petitioners' violation of Section 5301 was knowing. *United States* v. *Wasik,* 230 F. Supp. 280, 281–282 (W.D. Pa.). As the court below pointed out (Pet. App. 14):

> The statute [Section 5606] specifically does not relieve one [of liability] merely because, in selling or offering to sell, he happens to be an "agent or employee" of the owner. The apparent purpose of * * * § 5606 * * * is to provide that persons who are corporate officers, directors, or agents and who do not themselves sell or offer for sale but aid and abet a corporation that does, may not be punished if they lack scienter. However, we are not concerned here with the scope of that provision because the individual defendants were charged directly as

[3] This 1958 amendment reduced the Section 5301 offense from a felony to a misdemeanor and eliminated the element of willfulness.

> "persons who sell and offer for sale distilled spirits."[4]

The indictment's reference to petitioners as agents of the corporation was merely descriptive and did not change the nature of their liability.

2. Petitioners contend that the trial court improperly amended the indictment by inserting the word "knowingly" in front of the word "possess". The court made the oral amendment solely to accommodate petitioners, who claimed in their motion for acquittal that knowing possession was an element of the offense with which they were charged (Vol. I, 101). The court went on to instruct the jury that:

> [i]f either one or both of these defendants had no knowledge at all as to whether or not this liquor was altered, you could not find them guilty under the charges laid in this indictment [Vol. II, 10].

(See also Vol. II, 6.) Petitioners did not object to the court's instructions, even though the court expressly gave them an opportunity to do so (Vol. II, 13–14).

Neither the insertion of the word "knowingly" in the indictment nor the subsequent instruction to the

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[4] The indictment reads in pertinent part: "That on or about February 25, 1970, at Lowell in the District of Massachusetts, WEDGEWOOD, INC., a Massachusetts corporation doing business as Celebrity Lounge, and GEORGE A. PERRON and MANUEL J. BELLO, agents of said corporation, the defendants herein, being persons who sell and offer for sale distilled spirits, did possess ten (10) liquor bottles, more or less, the original contents of which had been altered or increased * * *."

jury prejudiced petitioners. As the court below correctly pointed out, "the trial court merely gave the defendants an extra bonus of which they cannot complain" (Pet. App. 15 n. 6). The action of the trial court in this case is not comparable to the situations in *Stirone* v. *United States*, 361 U.S. 212, and *Ex parte Bain*, 121 U.S. 1, where it was held that a defendant cannot be tried on charges that are not made in the indictment.

3. Relying on *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, petitioners maintain that their Fourth Amendment rights were violated since they were not given an opportunity to refuse to allow the seizure and incur the statutory penalty under 26 U.S.C. 7342. This case, however, is unlike *Colonnade* where the agents were refused entry and then broke a locked door. Neither petitioner nor the barmaid on duty refused to allow the bottles to be tested and the agents used no force in seizing them. Cf. *United States* v. *Biswell*, *supra*. Perron's contention that the seizure was almost finished when he arrived, thus eliminating any chance he had to object, is not supported by the facts. The evidence clearly establishes, as the court of appeals noted, that the testing was still in progress when he arrived and that he made no objection. In these circumstances, the search and seizure were reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1972.

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